IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of Pet's Mtn. to
Amend Petition
AG Donna Malkin
2/12/09 Date Signed

NO. 39212-7-II

PERSONAL RESTRAINT PETITION

83815-1

Eric Sheridan Flint
Petitioner's Full Name

A. STATUS OF PETITIONER

I, Eric Sheridan Flint, Yakima County Jail, 111 N. Front St., Yakima, WA 98901, apply for relief from confinement. I am not now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: DOC "Return to total confinement" sanction imposed pursuant to ESSB 6157 and RCW 9.94A.737(2) *(effective until August 1, 2009).*

1. The court in which I was sentenced is: DOC O.A.A. Hearing held at Kitsap County Jail.
2. I was convicted of the crime of: No criminal conviction; violation of community custody.
3. I was sentenced after Plea of Guilty on February 12, 2009.
4. The Judge who imposed sentence was DOC Hearing Officer Ernest Torek.
5. I had no lawyer at the hearing.
6. I did appeal the decision of the hearing. I appealed to the Department of Corrections Regional Appeals Panel.
7. I had no lawyer for my appeal.
8. ~~Since my sanction I have asked a court for some relief from my sentence other than I have already written above. I have filed one previous PRP with Division II. No decision has been made yet concerning my first Personal Restraint Petition.~~
9. ~~This, as I mentioned earlier, is my second PRP filed with Division II. I am requesting the same relief: release from confinement. The reason for my filing is based on the August 1, 2009 enactment of ESSB 5288 and the subsequent changes made to Washington State RCW's because of that enactment.~~

B. GROUNDS FOR RELIEF:

I claim that I have six reasons for this court to grant me relief from the conviction and sentence described in Part A. Those grounds are attatched following section "D" and proceeding section "E".

1. I should be released from confinement because of the following legal reasons that give me the right to be released: (1) The enactment of 2009's ESSB 5288 expires the sanction imposed upon me (section 13 and RCW 9.94A.737) *ESSB 5288, s. 19*, and expires it retroactively *ESSB 5288, s. 20*; (2) The creation of 2007's ESSB 6157 s. 305 (RCW 9.94A.737 (effective until August 1, 2009)) has created what is, in my opinion, an ex post facto law in that it has made the punishment harsher now than when my original conviction and sentencing took place (2002), by giving the Department of Correction's the ability to revoke an offender's "earned time" after they were released from confinement for violating the terms of their sentence. An ability they didn't have until 2007; (3) DOC's imposition of the sanction stated in RCW 9.94A.714(1) (2008 c. 231 s.16) (effective August 1, 2009) upon me is, in my opinion, clearly against the intent of the legislature since they have stated "*Sections 6 through 58 of this act shall not affect the enforcement of any sentence imposed prior to August 1, 2009 unless the offender is re-sentenced after that date.*" 2008 c.231 s.55 and since the sanction imposed is "return to total confinement to serve the remaining portion of your sentence" *RCW 9.94A.737,* DOC is, in fact, "enforcing" a "sentence" that was "imposed prior to August 1, 2009" (my sentence was imposed April, 2002) it should, in no way, apply to me.

2. The following facts are important when considering my case: (1) At the hearing where this sanction was imposed upon me, I was never informed of DOC's intent, ability, right, or requirement to impose this sanction. I was led to the hearing with the recommendation of 30 days confinement from my CCO, karla Pijazsek. As noted in "Fifth Ground", Ms. Pijaszek was

completely unaware herself that the sanction even existed therefore placing me at an unfair advantage and an undue risk of sanction since, with the obvious intent of Ms. Pijaszek to recommend a sanction of only 30 days, I was taken to a "full hearing" without the knowledge of the possible consequences that would ensue from a third hearing. I believe that if Ms. Pijaszek were to have been fully aware of the possibility of the "return" sanction, she would have considered different measures.

3. The following reported court decisions in cases similar to mine show the errors I belive happened in my case:

Mitchell v. Kitsap County, 59 Wash. App. 177, 180-181, 797 P.2d 516 (1990)
U.S. v. Spilotra, 562 F. Supp. 853 (D. Nev 1983)
Jessop v. U.S. Parole Comm., 889 F2d. 831 (9th Cir. 1989)
Brady v. Maryland, 373 U.S. 83 (1963)
Berger v. U.S., 295 U.S. 78 (1935)
U.S. v. Beals, 87 F.3d 854 (7th Cir. 1996)
U.S. v. Paskow, 11 F.3d 873 (9th Cir. 1993)
State v. Whitaker, 112 Wash. 2D 341, 771 P.2d 332 (1989)
Johnson v. U.S.
California Dept. of Corrections v. Morales, 514 U.S. 499, 506-507, n.3 (1995)
United States v. Page 1173, 1176 (1997)
Greenfield v. Scafati, 277 F. Supp. 644 (Mass. 1967)
summarily aff'd, 390 U.S. 713 (1968)
Weaver v. Graham, 450 U.S. 24 (1981)
Wolff v. McDonnell, 418 U.S. 539, 557 (1974)
Warden v. Marrerro, 417 U.S. 653, 658 (1974)
16 F. 3d. 1001 (CA9 1994)
Roller v. Cavanough, 984 F.2d 120 (CA4), cert. Dism'd, 510 U.S. 42 (1993)
Akins v. Snow, 922 F.2d 1558 (CA11), cert. Denied, 501 U.S. 1260 (1991)
Rodriguez v. United States Parole Commission, 594 F2d. 170 (CA7 1979)
State v. Reynolds, 642 A. 2d. 1368 (N.H. 1994)
Griffin v. State, 315 S.C.285, 433 S.E. 2d. 862 (1993), cert. Denied, 510 U.S. 1093 (1994)
Tiller v. Klincar, 138 Ill. 2D 1, 561 N.E. 2D 576 (1990), cert. Denied, 498 U.S. 1031 (1991)
Calder v. Bull, 3 U.S. 386 (1798)
Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994)

4.The following statutes and constitutional provisions should be considered by the court:

ESSB 6157 s. 305
ESSB 5288 s. 13, 14, 19, 20
Chapter 231, Laws of 2008 s. 16 (RCW 9.94A.714), 55

RCW 9.94A.737 (effective until August 1, 2009)
RCW 9.94A.737 (effective August 1, 2009)
RCW 9.94A.633
Note Following *RCW 9.94A.701 (2008 c. 231* s. 55) "*Application-2008 c. 231 s.6-58*"
U.S. Constitution, Article 10, S. 1 (*Ex Post Facto* clause)

5. This petition is the best way I know to get the relief I want, and no other way will work as well because since I have been "returned to total confinement" as a sanction, and since when I filed my appeal to the DOC Regional Appeals Panel ESSB 6157 s. 305 (RCW 9.94A.737(2) effective until August 1, 2009) was still legally in effect, the sanction was affirmed pursuant to the statutes in effect at that time.

C. STATEMENT OF FINANCES:

1. I do ask the court to file this without making me pay the $250 filing fee because I am so poor and connot pay the fee.

2. I have $0.00 in my prison or institution account.

3. I do ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.

4. I am not employed. My salary or wages amount to $0.00 a month. I have no employer.

5. During the past 12 months I did not get any money from a business, profession or other form of self-employment.

6. During the past 12 months I:

Did not receive any rent payments.

Did not receive any interest.

Did not receive any dividends.

Did not receive any other money.

Do not have any cash except as said in question 2 of Statement of Finances.

Do not have any savings or checking accounts.

Do not own any stocks, bonds, or notes.

7. I own no real estate, other property, or anything of value which belong to me or which I have an interest in.

8. I am not married.

9. There are no persons who need me to support them.

10. I owe bills to WADOC, and Allied Credit.

D. REQUEST FOR RELIEF:

I want this court to overturn the "return to total confinement to serve the remaining portion of your sentence" sanction imposed upon me and release me from confinement.

Brief

This is the second PRP I have filed requesting the same relief: release from confinement. The first PRP is still awaiting judgement in Division 2. This PRP has been filed pursuant to new laws that have gone into effect and/or expired pursuant to the August 1, 2009 effective date of ESSB 5288. The sanction I am confined pursuant to, RCW 9.94A.737(2) has been retroactively expired. DOC's decision to not apply the expiration to my situation is the reason for filing this new petition. As mentioned in the first second ground, a letter from DOC has stated that the sanction shall remain in effect reguardless of the retroactive expiration now that the new RCW 9.94A.714(1) has taken effect August 1, 2009. That, in itself, seems to go against the intended application of that RCW since the application portion states: "*Sections 6-58 of this act shall not affect the enforcement of any sentence that was imposed prior to August 1, 2009 unless the offender is resentenced after that date.*" Chapter 231, Laws of 2008 (55). Since I am being confined in Yakima County RAP says that I should file in the county I am being detained in therefore explaining my decision to file in Division 3. As I previously mentioned, this PRP is spurred by the subsequent changes in the law that have taken place August 1, 2009 and DOC's decision NOT to apply these changes to my case even though it clearly states that RCW 9.94A.737 expires retroactively.

First Ground

"*An offender is subject to the terms of community custody as of the date of sentencing.*" ESSB 5288. In my opinion, this statement that is applied retroactively pursuant to ESSB 5288, section 20, states what will be expanded upon in this ground: The terms of community custody that were in affect "as of the date of sentencing" are those that shall govern the offender throughout the imposed sentence. To change the terms or application in any way that increases the severity of the punishment that was annexed to the crime when the sentence was imposed creates an ex-post facto law in violation of the United States Constitution. The Eighth Circuit Court of Appeals held that a South Dakota statute revoking a defendant's good-time credits for violation of parole, which the statute was enacted after the defendant had committed the offense that resulted in his conviction and sentence, but before he was released on parole, was an ex-post facto lay that increased the severity of the defendant's sentence. *Williams v. Lee,* 33 F.3d 1010 (8th Cir. 1994). My original conviction was on 4/19/2002, a full five plus years before the enactment of *ESSB 6157.* Since the sanction I'm currently serving isn't based on **new** crimes committed, but on violations of the **sentence** and **conditions of said sentence** thereby clearly tying it to the original sentence which occurred years before the implementation of the non-retroactive *RCW 9.94A.737 (effective until August 1, 2009). The Law of Probation and Parole, 2nd ed. Vol. 2, 18:9* states: "*As a general rule, the law in effect at the time of a defendant's commission of a criminal offense or conviction ordinarily remains the law that governs questions relating to the defendant's probation or*

parole. Subsequent changes in statutes that adversely affect a probationer's or parolee's rights[1] *can be applied prospectively only. Otherwise subsequent changes in the law would constitue an unlawful ex post facto law."* If we look to *Johnson v. U.S. pg. 1, sec. 1 (2000) "To prevail with an ex post facto claim, Johnson must show, inter alia, that the law operates retroactively. Contrary to the Sixth Court's reasoning, post-revocation penalties are attributable to the original conviction, not to defendant's...violating their supervised release conditions. Thus to sentence Johnson under 3583(h) would be to apply this section retroactively. However, absent a clear statement of congressional intent, only in cases in which the initial offense occurred after the amendment's effective date, September 13, 1994. The Government offers nothing indicating a contrary intent."* In my case, you'll see that with the enactment of *ESSB 6157* in August, 2007 and this new *RCW 9.94A.714 (2008 c. 231 s. 16)* and with no "clear statement of congressional intent" to apply either of them retroactively, it is a clear violation of the *ex post facto* clause. There is just no way the Department of Corrections should be able to violate certain offenders one way and others another way WITHOUT admitting they are attributing it to the original crime and seeing that I plead guilty over five years before the sanction I am now serving went into law, it therefore violates the *ex post facto* clause of the U.S. Constitution. *Johnson v. U.S.* continues with: "The heart of the Ex Post Facto Clause, *U.S. Const., Art. 1, 9*, bars application of a law "*that changes punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed...*" *Calder v. Bull, 3 Dall. 386, 390 (1798)* (emphasis deleted). *To prevail on this sort of ex post facto claim, Johnson must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted.* See *California Dept. of Corrections v. Morales, 514 U.S. 499, 506-507, n. 3 (1995)*." While in the Johnson case the Sixth Circuit "*disposed of the ex post facto challenge by applying its earlier finding holding the application of 3583(h) not retroactive at all: revocation of*

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1 *e.g., U.S. v. Beals, 87 F. 3d 854 (7th Cir. 1996)*
U.S. v. Paskow, 11 f. 3d 873 (9th cir. 1993)
State v. Whitaker, 112 Wash. 2D 341, 771 P.2d 332 (1989)

supervised release "imposes punishment for defendant's new offenses for violating the conditions of their supervised release." United States v. Page 1173, 1176 (1997). "While this understanding of revocation of supervised release has some intuitive appeal, the Government disavows it, and wisely so in view of the serious constitutional questions that would be raised...by revocation and reimprisonment as punishment for the violation of the conditions of supervised release where such violations often lead to re-imprisonment, the violative conduct need not be criminal and need only be affirmed by a judge under a preponderance of the evidence standerd, not by a jury beyond a reasonable doubt." "For that matter, such treatment is all but entailed by our summary affirmance of Greenfield v. Scafati, (Mass. 1967) (three-judge court), summarily aff'd, *390 U.S 713 (1968) , in which a three-judge panel overturned on ex post facto grounds the application of a Massachusettes statute imposing sanctions for violation of a prisoner originally sentenced before its enactment. We therefore attribute post revocation penalties to the original conviction." Johnson v. U.S.* This ground hinges on a few different areas of the ex post facto argument: (1) That with my conviction originally taking place five full years before the enactment of *ESSB 6157*, and therefore the sanction imposed, the sanction should have never been imposed to begin with, but we see, due to the fact that the sanction WAS imposed, that the Department of Corrections must have found a way to circumvent the clause and therefore circumvent the United States Constitution in the process; (2) with the enactment of *ESSB 5288* on Aug. 1, 2009 and sec. 13 of that bill along with *RCW 9.94A.737* removing the sanction that Mr. Flint was confined pursuant to and as noted earlier, removing it retroactively, the only way that Mr. Flint is being held is based on only his original crime therefore inflicting a "greater punishment" than when the original crime was committed. At the time Of. Mr. Flint's sentencing, 2002, the law required offenders be granted 1/3 time off for good behavior that could be earned while serving their sentence. Nowhere did it state that for violating the sentence of community custody would cause an offender to then, after EARNING that 1/3 off, be returned to serve more time than was required upon the date of sentencing (2/3). "*The ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually*

imposed...Removal of the possibility of a sentence less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in that the standard of punishment adopted by the new statute is more onerous than that of the old." Id., at 401, California Dept. of Corrections v. Morales, 514 U.S. 499, (1995). Citing that same case, page 518 goes on to reaffirm the belief that has been stated multiple times throughout this ground "*...we have noted that an impermissible increase in the punishment for a crime may result not only from statutes that govern initial sentencing but also from statutes that govern parole or early release. Thus, in Weaver v. Graham, we addressed a Florida statute that altered the availability of good time credits. We rejected any notion that the removal of good time credits did not constitute an increase in punishment, explaining that "a prisoner's eligibility for reduced imprisonment is a significant factor in the defendant's decision to plea bargain and the judge's calculation of the sentence imposed."* Id., *at 32, citing* Wolff v. McDonnell, *418 U.S. 539, 557 (1974);* Warden v. Marrerro, *417 U.S. 653, 658 (1974); See also* Greenfield v. Scafati, *277 F. Supp. 644, 645 (Mass. 1967)* (three-judge court) ("The availability of good conduct deductions is considered an essential element of the sentence"), summarily aff'd, 390 U.S. 713 (1968)." It therefore changes the low end and minimum requirement that was in place at the time the sentence was imposed, the punishment for violating the conditions imposed AT THE TIME OF SENTENCING, and therefore the punishment inflicted on me has increased from what was allowable at the time of both conviction and sentencing; (3) The clear application of *2008 c. 231 s. 6-58* to only sentences imposed after the effective date of August 1, 2009 in my eyes shows the legislature's full knowledge of what creating an ex post facto law entails, and therefore their explicit statement and application shows that they are avoiding creating one by NOT applying this new sanction to any sentence imposed prior to August 1, 2009. If you'll look at *Weaver v. Graham, 450 U.S. 24 (1981)*, you'll see that Weaver, the petitioner, was sentenced to 15 years in prison for second-degree murder. At the time of both the consummation of the crime and at the time the sentence was imposed, "*state statutes provided a formula for mandatory reductions to the terms of all prisoners who complied*

with certain prison regulations and state laws. The statute that the petitioner challenged and that we invalidated retroactively reduced the amount of "gain time" credits available to prisoners under this formula. Though the statute preserved the possibility that some prisoners might win back these credits if they convinced prison officials to exercise their discretion to find that they were especially deserving, see 450 U.S., at 34m n. 18, we found that it effectively eliminated the lower end of the possible range of prison terms. Id., at 26-27, 31-33." *514 U.S. 499 (1995). "The enhancement of a crime or penalty seems to come within the same mischief as the creation of a crime or penalty, and therefore the must be classed together."* Calder v. Bull, 3 U.S. 397. I believe this to be almost a mirror image of this case. At the time of Mr. Flint's crime and sentencing, Washington State statutes allowed for 1/3 of the sentence to be earned as time off for good behavior. There was no clause, law, or policy at that time granting DOC the right or ability to take away that earned time except for certain extenuating circumstances such as committing a new felony while still in custody. There was no statute allowing for that time earned to be taken away after an inmate was released from total confinement. As I mentioned earlier, that statute didn't come into effect until August 1, 2007, a full 5 plus years after Mr. Flint's crime. For DOC to apply the 2007 statute was unconstitutional to begin with, and for them now to not adhere to the retroactive **expiration** of the sanction, and to in fact attempt to reapply a NEW sanction that EXPLICITLY states that it "*shall not effect the enforcement of any sentence imposed prior to August 1, 2009.*" is what I believe is against both Washington State law and the Federal *ex post facto* clause of the U.S. Constitution. "*Nor, finally, has Congress given us anything expressly identifying the relavent conduct in a way that should point to retroactive intent. It may well be that Congress, like the Sixth Circuit, believed that s.3583(h) would naturally govern sentencing proceedings for violations of supervised release that took place after the statute's enactment, simply because the violation was the occasion for imposing the sanctions. But congress gives no clear indication to this effect, and we have already rejected that theory;...our longstanding presumption directs that s.3583(h) applies only to cases in which the initial offense occurred after the effective date of the amendment...Given this*

conclusion...subsection (h) does not apply..." Johnson v. U.S. No.99-5153. The relevance to this case relies on the Court's conclusion that statutes pertaining to supervised release (community custody) are applicable only to cases "in which the initial offense occurred AFTER the effective date" of the statute. "*The Eighth Circuit Cout of Appeals held that a South Dakota statute revoking a defendant's good-time credits for violations of parole, which the statute was enacted after the defendant had committed the offense that resulted in his conviction and sentense, but before he was released on parole, was an ex post facto law that increased the severity of the defendant's sentence.*" Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994). In this case, the initial offense occurred January 27, 2002 with a conviction and sentencing date in March, 2002 and the statute's (ESSB 6157 s. 305) effective date of August 1, 2007. A separation of a full five years, therefore creating, in my opinion, an *ex post facto* law. "*The* Ex Post Facto *Clause raises...the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively.*" *Johnson v. U.S.* if my opinion is indeed correct and the plea agreement entered into in 2002 is, in fact, a binding contract, I should therefore be under the provisions and statutes that were in affect at the time of the agreement. At the time of the agreement, Washington State law allowed for inmates to earn 1/3 off. It did **not** allow for it to be taken following release. "*In 2d. Lord Raymond 1352, Raymond, Justice, called ... about registering contracts...an* ex post facto *law because it affected contracts made before the statute.*" *Calder v. Bull,* 3 U.S., 386 (1798). "*They shall not...increase the degree of punishment previously denounced for any specific offense.*" Calder v. Bull 3 U.S. 400.

Second Ground

ESSB 5288, sec. 13, pg. 43, ln. 5 states: "*If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing for any violation...the department shall return the offender to total confinement to serve up to the remaining portion of his or her sentence...*" I am here serving 647 days for the above mentioned sanction imposed per *ESSB 6157* (RCW 9.94A.737(2) (effective until August 1, 2009),which states the same thing. *ESSB 5288,* sec. 19, pg. 47, ln. 26-27 states that "*Sections 1, 3, and 13 of this act expire[1] August 1, 2009.*" *ESSB 5288,* sec. 20, pg. 47, ln 28-pg.48, ln. 1 states "*This act applies retroactively and perspectively regardless[2] of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody with the department, or sentenced after the effective date of this section.*" Therefore the expiration, being applied retroactively, affects all offenders who were sanctioned pursuant to this statute. *ESSB 5288,* sec. 18, pg. 47, ln 20-23 states "*sections 1...and 20 of this act...take effect immediately.*" All of this states that the sanction imposed upon me expires and therefore, in expiring, becomes void[3] as of August 1, 2009 and that the expiration is in fact retroactively applied to **all** offenders sanctioned per *ESSB 6157* or *RCW 9.94A.737 (effective until Aug. 1, 2009). Mitchell v. Kitsap County,* 59. Wash. App. 177, 180-181, 797 P.2d 516 (1990) states: "*A void judgement must be vacated whenever the lack of jurisdiction[4] comes to light.*" In summation of this ground, with the expiration af the sanction taking effect August 1, 2009, the sanction thereby becomes void and, in turn, removes all jurisdiction of the sanction over an offender serving the above mentioned sanction.

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1 *Expire: 1. to come to an end; terminate, as a contract, guarantee, etc.*

2 *Regardless: 4. in spite of*

3 *Void: (Law) 1. having no legal force or effect; not legally binding or enforceable*

4 *Jurisdiction: 1. the right, power, or authority to administer justice by hearing and determining controversies. 2. power, authority, control.*

Third Ground

In a June 30, 2009 letter from the Department of Corrections, DOC has admitted that section 13 of *ESSB 5288* (the section that contains the sanction in which Mr. Flint is confined pursuant to) does indeed expire August 1, 2009. They go on to state "*but* RCW 9.94A.714 *which becomes effective August 1, 2009 states "(1) If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing pursuant to* RCW 9.94A.737 *for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement...*" There seems to be a few legal problems with what DOC is implying for the reason they are continuing to keep me in confinement: First, as I mentioned earlier, the sanction I was sanctioned to, *ESSB 6157*, which became *RCW 9.94A.737(2)*, becomes an expired sanction as stated by *ESSB 5288*, section 18, as well as the expiration's retroactive application which has been made explicitly clear in section 20 of *ESSB 5288* means that as of August 1, 2009 I am being confined pursuant to an expired and therefore void sanction. The next problems come to light when we start to take a look into *RCW 9.94A.714*. First there is the nature of the RCW itself: it is not a "sanction" RCW as is RCW *9.94A.633*; it is not a "hearings-violations-sanctions" RCW as is *RCW 9.94A.737*. No, it is, in fact a "*Community custody - Violations - Immunity from civil liability for placing offenders on electronic monitoring*" RCW. With it having a CLEAR effective date of August !, 2009 and what I see is an obvious intent to lean toward offenders on electronic monitoring and granting the public a view of what will happen to those offenders placed on electronic monitoring when they violate for the third time after the effective date of August 1, 2009. That is why subsection (1) is now included in the "*immunity from civil liability for placing offenders on electronic monitoring*" RCW In fact, if you'll look at *ESSB 5288*, section 14, you'll see that the intent of the bill, and therefore the legislation, was that "*...all **sanctions** shall be imposed pursuant to RCW 9.94A.737.*" I'll mention it again that that RCW is entitled "*RCW 9.94A.737 Hearings-Violations-Sanctions*". Next, to apply a new RCW to an offender retroactively there has to be a **clear** legislative **intent** for that law (RCW) to be applied retroactively.

There is just no evidence showing that was the intent. In fact, if you look into *ESSB 5288*, the intent seems to be just the opposite. In *ESSB 5288* the legislature has made clear the fact that there intent was to EXPIRE the sanction **retroactively**, not IMPOSE an " *Immunity from civil liabilities for offenders placed on electronic monitoring*" RCW retroactively. Since Mr. Flint has been in custody since February 4, 2009, well before the effective date of the new *RCW 9.94A.714*, and has not been subject to the "third violation hearing" as mentioned in *RCW 9.94A.714*, after the RCW's specifically stated and intended formal effective date of August 1, 2009, and without the legal ability to apply this new RCW retroactively, there is just no way Mr. Flint should be able to be sanctioned to this new RCW. Mr. Flint was sanctioned pursuant to *RCW 9.94A.737(2) (effective until August 1, 2009)* not *RCW 9.94A 714 (1) (effective August 1, 2009)*. If the intent of the legislation was to keep Mr. Flint incarcerated for the sanction imposed upon him, the RCW he was sanctioned under, *RCW 9.94A.737*, would not have been expired retroactively. The bottom line is that Mr. Flint was sanctioned pursuant to an RCW that is **only effective until August 1, 2009 and expires retroactively.** This new RCW, *RCW 9.94A.714* (2008 c 231 s. 16) has **no** retroactive application and doesn't become effective **until** August 1, 2009 therefore giving *RCW 9.94A.714* absolutely no authority or jurisdiction over offenders in confinement pursuant to another sanction, in this case *RCW 9.94A.737(2)*, or violations committed before *RCW 9.94A.714*'s effective date of August 1, 2009. In fact, further examination of *2008 c 231 s. 55* shows clearly the application of section 6-58 of the bill (chapter 231, Laws of 2008). "*Sections 6 through 58 of this act* ***shall not*** *affect the enforcement of* ***any*** *sentence that was imposed* ***prior to August 1, 2009****, unless the offender is re-sentenced after that date."* 2008 c. 231 s. 55 (6). For DOC to use *RCW 9.94A.714*, an RCW that doesn't go into effect until August 1, 2009 and an RCW that is specifically stated to have no effect on the enforcement of **any** sentence imposed prior to August 1, 2009 and since the sanction imposed upon Mr. Flint is, in fact, "**enforcing**" the "remaining portion of your **sentence**", and since, in the same June 30, 2009 letter specified earlier, they can be quoted as saying: "*Therefore, you must serve the remainder of your* ***sentence*** *in total confinement...*" once again affirming the fact that this is the

"**enforcement**" of a "**sentence**" (a sentence that was imposed in 2002, years before the legislature's intended application of *RCW 9.94A.714*). If DOC is indeed using this RCW to continue to hold Mr. Flint in confinement, I believe it to be a clear violation of not only the *ex post facto clause* of the United States Constitution, but also a violation of the clear and explicit laws set forth by Washington State itself.

Fourth Ground

ESSB 5288, sec. 14, pg. 46 ln. 19-31 states "*The procedure for imposing sanctions for violations of sentence conditions or requirements is as follows: (1) If the offender was sentenced under the drug offender sentencing alternative, any sanctions shall be imposed by the department...pursuant to RCW 9.94A.660. (2) If the offender was sentenced under the special sexual offender sentencing alternative, any sanctions shall be imposed by the department...pursuant to RCW 9.94A.670. (3) If a sex offender was sentenced pursuant to RCW 9.94A.507, any sanctions shall be imposed by the board pursuant to RCW 9.95.435. (4) In any[1] other case, if the offender is being supervised by the department, any[2] sanctions shall[3] be imposed by the department pursuant to RCW 9.94A.737.*" In this case, the offender, Eric Flint was NOT sentenced under either (1), (2), or (3) above (*ESSB 5288*), therefore falling into the only other sub-category available, (4) and becoming "...any other case...", which directs, pursuant to the intent of the word "shall", that Mr. Flint be sanctioned pursuant to *RCW 9.94A.737*. To adhere to the new Legislation taking effect August 1, 2009 (*ESSB 5288* and the new version of *RCW 9.94A.737 (1),(effective August 1, 2009)* which states "*The department shall develop hearing procedures and a structure of graduated[4] sanctions.*") Mr. Flint's sanction history must be taken into account: "Credit for time served" (14 days), "Credit for time served" (12 days), and "Return to total confinement to serve the remaining portion of your sentence" (647days with no possibility of 1/3 off for good behavior). Those three sanctions, imposed over a period of one year, are by no means anything resembling a "structure of graduated sanctions". There is absolutely nothing gradual[5] about them. And with the retroactive application of ESSB 5288, that "structure of graduated sanctions" is a requirement pursuant to the legislature's use of the word "shall".

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1 *Any: 1. any unspecified person or persons; anybody; anyone*
2 *Any: 2. in whatever quantity or number, great or small. 3. every; all.*
3 *Shall: 1. (generally used in the second and third persons to denote authority or determination) will have to, is determined to, promises to, or definately will.*
4 *Graduated: base (graduate):1. to pass by degrees; change gradually*
5 *Gradual: 1. taking place, changing, moving, etc., by degrees or little by little*

Fifth Ground

Mr. Flint has attended three (3) full OAA hearings in the seventeen month period between August 27, 2007 (his release date from prison) and February 12, 2009 (the hearing where his earned time was "revoked") with the first hearing taking place on April 2, 2008. At no time, at no hearing, and by none of his CCO's was Mr. Flint EVER informed, either in writing or verbally, of DOC's right, ability, requirement, or intention of sanctioning him as a "return to total confinement to serve the remaining portion of your sentence." Through three CCO's, three hearings (four if you count the one he was found "not guilty" of all allegations at), and three different hearing officers, it wasn't until halfway through his final hearing where the possibility and intent of "revocation" was ever mentioned. *The Law of Probation and Parole, 2nd ed. Vol. 2, 22:38* states: "*A few decisions state that probation or parole should not be revoked unless the offender has been warned that failure to comply with release conditions may result in revocation.*[1] *To satisfy this rule, the sentencing court or parole board should clearly communicate the effect of noncompliance. Ideally, the written statement of release conditions should include this data.*" This becomes especially important when it is brought to light that DOC form *DOC 09-231, pg. 1* states that the offender has the right "*To examine, no later than twenty-four (24) hours before the hearing, all supporting documentary evidence which the Department of Corrections intends to present during the hearing.*" There isn't one documentary piece of evidence that shows the Department of Corrections ever warned Mr. Flint that his noncompliance could result in such extreme measures as revocation. " *The 9th Circuit held that the Parole Commission's failure to inform the parole before his revocation hearing that the time he spent on parole might be forfeited violated the parolee's due process rights.*"[2] This shows quilte clearly the 1/3 off for good behavior he earned while serving his incarceration (thirty-three months of "earned time") takes the place of parole in that if was truly "earned " as the department made very clear that it was, it should not have been able to be revoked to

1 *See e.g., U.S. v. Spilotra, 562 F. Supp. 853 (D. Nev 1983)*
2 *See Jessop v. U.S. Parole Comm., 889 F2d. 831 (9th Cir. 1989)*

begin with, but the fact that it could be should have at least been made clear to Mr. Flint. I believe that the department's failure to notify Mr. Flint that is not only a violation of the very explicit rights granted by DOC itself, it seems as though there was a blatant disregard of Mr. Flint's U.S. Federal and State constitutional right to due process. If we look to *Brady v. Maryland, 373 U.S. 83 (1963)* it "*requires disclosure only of evidence that is both favorable to the accused and material relative to guilt or punishment.*" The possible sanctions that could be imposed do qualify as "material relative to...punishment." If the hearing's transcripts are looked at you'll note the shock, and therein proving the lack of notification, of not only Mr. Flint himself, but his CCO, Karla Pijaszek as well. If we move on, *Brady v. Maryland* continues "*By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but a sovereignty***whose interest***in a criminal prosecution is not that it shall win a case, but that justice shall be done.*" *Berger v. U.S., 295 U.S. 78 (1935)*. Now, if we place CCO Pijaszek in the role of the prosecution, we'll see that not only did she never provided the necessary "material relative to...punishment", she never intended to, due to the fact that, as admitted by herself at the hearing, she was unaware that the sanction imposed even existed therefore making the fact that she took Mr. Flint to his third full hearing WITHOUT being cognizant of the consequences involved put Mr. Flint at a completely unfair disadvantage and undue risk of sanction since there were many other options (stipulated agreement, negotiated sanction, etc.) and routes she could have taken. If we look at the definition of "Due Process of Law", it says: " *a limitation in the U.S. Federal and State constitutions that restrains the actions of the instrumentalities of government within the limits of fairness.*" Mr. Flint was taken to the hearing with a recommendation of 30 days confinement, a chemical dependency evaluation, and MRT classes. Once again, let me restate that through three different CCO's (Tim Thompson, Port Orchard office; Lisa Adams, Bremerton office; Karla Pijaszek, Bremerton office) was there never any mention of the possibility of the previously mentioned - and

imposed - sanction. In any court of law it is a requirement that the defendant be notified of the maximum possible sentence. That is a constitutional right as part of due process. With no time to prepare a case, it was basically a trap and therefore what can only be described as a complete miscarriage of justice.

Sixth Ground

In this ground, we look into the simple fact that with this "return to total confinement" sanction, the Department of Corrections has taken away the ability for Mr. Flint to earn any sort of reduction in sentence for good behavior. "*...we have held that an increase in punishment occurs when the State deprives a person of the opportunity to take advantage of provisions for early release. Thus, in Weaver we emphasized that "petitioner is...disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." 450 U.S., at 33034. Out statement in Weaver was consistant with our holding in Lindsey that "it is plainly to the substantial disadvantage of petitioners to be deprived of all oportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the...term.*" 301 U.S. at 401-402. See also *Greenfield v. Scaffati*, 277 F. Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713 (1968) (*affirming judgement of a three-judge court that found an ex post facto violation in a statute that eliminated the opportunity to accumulate gain time for the first six months following parole revocation as applied to an inmate whose crime occurred before the statute's enactment*) It is thus no surprise that nearly every Federal Court of Appeals and State Supreme Court to consider the issue has so held." See, *e.g.*, 16 F. 3d 1001 (CA9 1994); *Roller v. Cavanough*, 984 F. 2d 120 (CA4), cert. Dism'd, 510 U.S. 42 (1993); *Akins v. Snow*, 922 F. 2d 1558 (CA11), cert. Denied, 501 U.S. 1260 (1991); *Rodriguez v. United States Parole Commission*, 594 F. 2d 170 (CA7 1979); *State v. Reynolds*, 642 A. 2d 1368 (N.H. 1994); *Griffin v. State*, 315 S.C. 285, 433 S.E. 2D 862 (1993), cert. Denied, 510 U.S. 1093 (1994); *Tiller v. Klincar*, 138 Ill. 2D 1, 561 N.E. 2D 576 (1990), cert. Denied, 498 U.S. 1031 (1991). *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995). At the time of Mr. Flint's sentencing, the statute allowed for the offender to earn 1/3 off for good behavior. Since the Department of Corrections has now, as a sanction, imposed the "remaining portion of the sentence", the same statutes that governed the sentence at the date of sentencing should then, in fact, govern the sentence still: the offenders ability to earn time off

for good behavior; and even if good time was lost for infractions, at the time of Mr. Flint's sentencing, it was still able to be earned back through continued good behavior. In fact, At the time of sentencing, and still to this day, earned time credits can only be granted and taken away by the institution the offender is housed at at the time the credits are earned, i.e. Washington State Penitentiary can't award good time credit for time spent in county jail, nor can they take it away just as community custody should not be able to take away earned time credits that were awarded by either the county jail or any other institution that awarded them during the offender's confinement. Quoting Justice Stevens in the *Morales* case, he states "*Under the present California parole procedures, there is no possibility that an inmate will benefit from the 1981 amendment: Instead of an unqualified statutory right to an annual hearing, the amendment leaves the inmate with no protection against either the risk of a mistaken prediction ot the risk that the Board may be influenced by its interest in curtailing its workload. Moreover, the statute gives an inmate no right to advance favorable changed circumstances as a basis for a different result...the 1981 amendment contains no off-setting benefits for the inmate. By postponing and reducing the number of parole hearings, ostensibly for the sole purpose of cutting administrative costs, the amendment will ata best leave an inmat in the same postion he was in and will almost inevitably delay the grant of parole in some cases.*" Depriving Mr. Flint of any opportunity to earn back his earned time has therefore made the punishment greater than that that was imposed upon sentencing since at the time of sentencing Washington State statutes granted offenders 1/3 off for good behavior for all sentences served in a State Facility except for certain "serious violent" offenses and, or, certain "enhancements" added to crimes. Neither of which Mr. Flint has ever been convicted of. Then to compound the punishment, Mr. Flint is being denied certain rights afforded to other DOC inmates who are serving their sentences in actual DOC facilities (Mr. Flint is serving the remaining 21 months of his 100 month sentence in Yakima County Jail) such as an offenders right to be present at his mandatory sixth-month reviews. The lack of Mr. Flint having these sixth-month reviews denies him of the chance to change custody levels, take advantage of any programs granted to other inmates at actual

State facilities, and, of course, the chance to speak with a counselor about earning good time. The same good time DOC offenders earn at institutions, serving their sentences. Since DOC has deemed this sanction :"return to total confinement to serve the remaining portion of your sentence", Mr. Flint should be granted the opportunity to earn his mandatory 1/3 off for good behavior since he is serving his sentence. I believe that DOC is once again enforcing an ex post facto law (statute) in violation of the United States Constitution.

OATH OF PETITIONER

STATE OF WASHINGTON)
)

COUNTY OF YAKIMA

I declare under penalty of purjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge..

DATED This 3rd day of AUGUST, 2009.

ERIC FLINT

YCDOC-MJ Debit : 9.80 Credits = 10.00 Bal = :0

Resident FLINT, ERIC SHERIDAN ID R442932

Report Criteria

Facility: YCDOC-MJ

Start Date: 2/3/2009 End Date: 7/21/2009

Account	No	Description	Debit	Credit	Balance
General	639315	NONE AT PREBOOK		0.00	
General	640847	check #32693		10.00	10.00
General	642062	Commissary Purchase	8.75	0.00	1.25
General	642841	Commissary Purchase	1.05	0.00	0.20